***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLANT

76-6172

# United States Court of Appeals
# For the Second Circuit

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P/S

EDWIN NACHBAUR,

*Plaintiff-Appellant,*

-against-

NATIONAL LABOR RELATIONS BOARD, N.Y.C. POLICE DEPT., WALTER DELLHEIM, ARGO INSTRUMENTS, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK,

*Defendants-Appellees.*

On Appeal From The United States District Court For The Southern District of New York

## Appellant's Brief

EUGENE PROSNITZ
Attorney for Plaintiff-Appellant
50 Court Street
Brooklyn, N.Y. 11201
(212) 834-8656

Dick Bailey Printers, 290 Richmond Ave., Staten Island, N.Y. 10302
Tel. (212) 447-5858

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CASES CITED

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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EDWIN NACHBAUR

Plaintiff/Appellant,

Docket No.
76-6172

V.

NATIONAL LABOR RELATIONS BOARD,
POLICE DEPARTMENT, CITY OF NEW YORK,
WALTER DELLHEIM, ARGO INSTRUMENTS CORP.,
and UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK,

Defendants/Appellees.

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## INTRODUCTORY STATEMENT

Plaintiff-Appellant, Edwin Nachbaur, instituted an action in the United States District Court for the Southern District of New York, in 1975. The action was instituted for the purpose of obtaining access to, and production of, certain records.

The District Court dismissed this action, by order of the Hon. ROBERT L. CARTER, dated October 15, 1976. The present proceeding is an appeal from the dismissal of this action by the District Court.

## BACKGROUND

The instant case is the third of a series of related cases brought by plaintiff in the federal district courts.

This series of lawsuits arose out of the fact that plaintiff was terminated from his employment with defendant Argo Instruments Corporation. Following his termination, plaintiff filed complaints with the National Labor Relations Board, and with state and federal anti-discrimination agencies; without successful results.

Plaintiff then instituted an action in the Eastern District of New York, on July 13, 1972 , against his former employer, and against his union representative. (72 Civ 930). He sought reinstatement with back pay, plus additional monetary damages.

The above case was referred to the Hon. VINCENT A. CATOGGIO, United States Magistrate, for a hearing and a report. A hearing was held, and subsequently, the district court dismissed said complaint, by order of the Hon. EDWARD R. NEAHER, dated May 9, 1974.

Plaintiff then instituted a second action in the Eastern District of New York, on May 9, 1974. (74 Civ. 725). Said action was brought against Magistrate Catoggio, and against Court Reporter Ann Raffrey, as defendants. In said action, plaintiff alleged that the transcript of the hearing which had been held before Magistrate Catoggio on January 7, 1974, had been altered. In his claim for relief, plaintiff sought to strike from the record said altered minutes, and

to remove said defendants from public office.

The hearing of January 7, 1974 had been recorded by two different methods. Ms. Raffrey took stenographic notes, and subsequently prepared a typed transcript; at the same time, a tape recording was made of the testimony.

Subsequently, the district court judge compared the tape recordings with the typed transcript and found plaintiff's claim that said transcript had been altered, to be without merit. However, plaintiff was denied the opportunity to personally hear the tapes, despite his requests to that effect.

As a result, the district court, by the Hon. EDWARD R. NEAHER, dismissed plaintiff's complaint, by order dated May 28, 1974.

Plaintiff appealed the dismissal of 72 Civ. 930 to the Court of Appeals for the Second Circuit. This court dismissed the appeal, by order dated April 28, 1975. A subsequent petition for certiorari to the U.S. Supreme Court was denied.

The instant action was instituted in the District Court for the Southern District of New York, on August 29, 1975. (75 Civ. 4296). In the instant action, plaintiff seeks access to certain records and documents. Specifically, plaintiff seeks:

(a) Records and documents in the possession of

the National Labor Relations Board.

(b) Records and documents in the possession of the New York City Police Department.

(c) Records and documents in the possession of plaintiff's former employer, Argo Instruments Corporation.

(d) The tape recordings of the hearing held before Magistrate Catoggio on January 7, 1974.

The district court dismissed the instant complaint, by judgment and opinion by the Hon. ROBERT L. CARTER, dated October 15, 1976. The instant appeal is from said dismissal.

In view of the fact that the earlier cases were dismissed, there does not appear to be federal court jurisdiction over the records in the possession of the New York City Police Department, or over the records in the possession of Argo Instruments Corporation. Accordingly, the balance of this brief will examine plaintiff's request for access to records and documents in the possession of the National Labor Relations Board, and for access to the tapes of the Eastern District hearing of January 7, 1974.

POINT I: IN DISMISSING PLAINTIFF'S PRESENT COMPLAINT, THE DISTRICT COURT INCORRECTLY INVOKED THE DOCTRINE OF RES JUDICATA.

The District Court for the Southern District, in dismissing the instant action, relied primarily on the doctrine of res judicata, holding that plaintiff's instant claims had already been litigated before Judge in the East-

ern District, and determined by him.

This is not correct. Plaintiff's initial action (72 Civ 930) did not specifically seek production of documents and records from the N.L.R.B. In fact, the N.L.R.B. was not a party to the original action. Instead, in the original action, plaintiff sued his union and former employer, seeking reinstatement, back pay and money damages.

The present action (75 Civ. 4296) seeks records in the possession of the N.L.R.B., pursuant to the Freedom of Information Act, 5 U.S.C. 551 et seq.). Said Act of Congress has been held to expand the right of the public to access to information in the possession of agencies of the federal government. Rose v Dept. of the Air Force, 495 F. 2d 261, (2nd Cir., 1974), affd., 96 S. Ct. 1592 (1976).

The present action is primarily based upon a request by plaintiff to the N.L.R.B. for information, by letter dated April 26, 1975. The N.L.R.B. denied plaintiff's request, in a letter from the office of its general counsel, dated July 29, 1975.

This letter of July 29, 1975 is submitted as one of the documents in plaintiff-appellant's appendix. Said letter does not appear to have been part of the district court record; however, since the letter constitutes an official determination of a federal agency, it is respectfully re-

quested that this court take judicial notice of its contents.

Thus the instant action constitutes, in part, a request for judicial review of the N.L.R.B.'s determination of July 29, 1975. Said judicial review is authorized by 5 U.S.C. 552 (a) (4) (B).

Since the earlier cases, in the Eastern District of New York, had already been dismissed by Judge Neaher prior to the N.L.R.B.'s determination of July 29, 1975, it is self evident that said determination could not have been reviewed by the Eastern District Court. Furthermore, neither of Judge Neaher's opinions addresses the question of access to N.L.R.B. records.

Similarly, the issue of plaintiff's access to the tape recordings of the district court hearing of January 7, 1974, was never judicially determined in the Eastern District cases. The first proceeding, 72 Civ. 930, had no connection to the question of the tapes, nor did the court's opinion in that case refer to said tape recordings.

In the second action, 74 Civ. 725, plaintiff sought two different elements of relief. He sought to strike from the record a transcript which he alleged had been altered, and he sought to remove certain persons (i.e. the magistrate and the court reporter) from public office.

Judge Neaher dealt with both of those questions in his opinion and order of May 28, 1974.

However, in the instant case plaintiff raises a third question, i.e. the question of his right to said tapes (or the transcript of said tapes). Thus, in the instant case, plaintiff is not seeking to correct a transcript, or to remove certain officials from public office; he is merely seeking information pertaining to his case. This is an entirely separate issue, which was not litigated in the two prior proceedings.

POINT II: PLAINTIFF HAS A DUE PROCESS RIGHT TO HEAR AND EXAMINE THE TAPE RECORDING OF THE HEARING HELD IN THE EASTERN DISTRICT OF NEW YORK, ON JANUARY 7, 1974.

As stated earlier, during the litigation of the Eastern District case, 72 Civ. 930, a hearing was held before Magistrate Catoggio, on January 7 ,1974. This hearing was recorded by two different methods; stenographic notes, and a tape recording.

The stenographic notes have been transcribed and are part of the court record (of 72 Civ. 930). However, plaintiff claims that said transcript is inaccurate, and seeks to examine the tape recording.

In his opinion of October 15, 1976, Judge Carter states that court transcripts "are matters of public record and easily obtained without the necessity for court process." (Presumably, this statement should apply to tape recordings

as well as to written transcripts).

We agree with Judge Carter that court transcripts are matters of public record, and should be easily obtainable. However, in the instant case plaintiff informs counsel that he has been repeatedly frustrated by the court clerks of the Eastern District of New York, in his efforts to obtain said tapes, despite the fact that he is ready, willing and able to pay for them.

Plaintiff instituted this suit under the Freedom of Information Act. Respondents have previously pointed out that said Act does not apply to the courts, but only to federal agencies.

However, that is not a ground for dismissal of the complaint, because plaintiff is entitled to relief as a matter of constitutional due process, apart from the Freedom of Information Act. The fact that plaintiff's complaint may have stated the wrong legal theory does not bar him from relief; it is not necessary to set forth the particular legal theory under which recovery is sought, in order to have a valid cause of action. Misco Leasing Co. v Keller, 490 f 2d 545, (10th Cir., 1974).

Furthermore, complaints drafted by pro se litigants must be liberally construed, and should be held to less stringent standards than pleadings drafted by attorneys. Merckens v F.I. Dupont, 514 F 2d 20 (2nd Cir., 1975); John v Hurt,

489 F 2d 786, (7th Cir., 1973). If plaintiff has stated the wrong legal theory in his complaint, the remedy should be amendment of the complaint, not dismissal.

Since plaintiff is seeking tape recording which are, presumably, in the possession of a clerk or court officer in the Eastern District; a mandamus action directed to the Eastern District of New York would probably have been the most appropriate procedural vehicle. However, if plaintiff has sued in the wrong district, the appropriate remedy would not be a dismissal of his action, but would be an order granting a change of venue, pursuant to the provisions of 28 U.S.C. 1404a. In cases where venue is defective, the case may be transferred to the proper judicial district. Junior Spice, Inc. v Turbotville Dress, Inc., 339 F Supp. 1189.

As a matter of due process, a litigant should be afforded access to all materials which may be relevant to his case. In Sigafus v Brown, 416 F 2d 105 (7th Cir.,1969), the 7th Circuit held that deprivation of materials necessary to afford reasonable access to the courts, violates the due process clause.

In Sigafus, the materials in question were legal papers which were in the possession of the deputy sheriff.

It is well settled law that litigants have a due process right to be granted access to adverse evidence, in-

cluding adverse governmental recommendations and reports, so that may have the opportunity to rebut said evidence, or said factual findings. United States v Gonzalez,348 U.S. 407 (1955); United States v Simmons, 348 U.S. 397, (1955); United States v Purvis, 403 F 2d 555, (2nd Cir., 1968).

While the above cases were criminal cases, the issue of access to government reports arose in a civil context; i.e. the issue of whether there was a basis in fact to support the government's denial of conscientous objector status to the individual litigant. The result would have been the same if these cases had been civil proceedings, e.g. habeas corpus proceedings seeking discharges from military service.

In the instant case, plaintiff seeks access to tape recordings of a hearing which was held in his previous case. Plaintiff does not wish to accept the Eastern District Court judge's analysis of the contents of said tapes; he prefers to hear the tapes for himself.

This is no reflection on the district court; it is certainly possible that plaintiff, who has been willing to devote considerable time and energy to this litigation, would study the tapes more thoroughly and perceive certain items of evidence, certain nuances, which the district court judge may have overlooked.

In Alderman v United States, 394 U.S. 165(1967),

the Supreme Court held that transcripts of electronic surveillance must be turned over to the defendant; it is not sufficient for the trial judge to read said transcripts in camera.

A similar rule applies to exculpatory evidence to be furnished, in advance of trial, by a prosecutor. See Brady v Maryland.

The in camera procedure has generally been reserved for cases involving informers, or other persons whose confidentiallty must be protected. These factors do not apply in the instant case; there are no confidential relationships which would be affected by a release of said tapes to plaintiff.

The effective administration of justice is best served by maximizing public confidence in the judicial system. This can be achieved by permitting broad access to the materials of litigation. If a litigant wishes to examine these materials for himself, rather than relying upon the judge's examination of said materials, he should be permitted to do so. This will help restore public confidence that the courts have nothing to hide.

POINT III: PLAINTIFF HAS A RIGHT, PURSUANT TO THE FREEDOM OF INFORMATION ACT, TO EXAMINE RECORDS AND DOCUMENTS PERTAINING TO HIS CASE WHICH ARE IN THE CUSTODY OF THE NATIONAL LABOR RELATIONS BOARD.

As stated earlier ,plaintiff, in his complaint, seeks the release of documents and records in the possession of the N.L.R.B., pertaining to the complaint which he originally filed with the N.L.R.B.

In its letter from the Office of the General Counsel, dated July 29, 1975, the N.L.R.B. cited certain exceptions to the Freedom of Information Act, i.e. 5 U.S.C. 552(b)(5),(7A),(7C), and 7(D), as its justification for denying plaintiff the information and records which he seeks.

In Rose v Dept. of the Air Force, 495 F. 2d 261, (2nd Cir.,1974), affd., 96 S. Ct. 1592 (1976); the Supreme Court held that the purpose of the Freedom of Information Act was to pierce the veil of administrative secrecy and to open agency action to public scrutiny. The court held that exceptions to the act must be narrowly construed, and should be allowed only in cases where denial of information may be necessary to prevent an invasion of personal privacy, or when the release of the information will cause serious harm to certain individuals.

The cases cited in the N.L.R.B. letter determination

are ,for the most part, cases in which employers were denied information in the files, because the information in question had been gathered from employees who might face retaliation if the employer learned that said employees had furnished said information to the N.L.R.B. Clearly, this has no applicability to the instant case, where plaintiff is a former employee who is in no position to retaliate against his former employer or co-workers.

(It should be noted that a litigant may have an even greater right of access to records than that afforded to a third party under the Freedom of Information Act. See United States v Weinstein, 511 F. 2d 622, (2nd Cir., 1975).)

IInany event, Sect. 5 U.S.C. 552 (a)(4)(B) of the Freedom of Information Act places the burden squarely upon the government to sustain its denial of information or records. This has not been done in the instant case; the Southern District court dismissed this case without ever reaching the merits of the N.L.R.B's determination of July 29, 1975.

CONCLUSION:

In view of the above, this matter shoubd

be reversed and remanded to the District Court for further proceedings.

Respectfully submitted

EUGENE PROSNITZ, Esq.
Attorney for Plaintiff-Appellant

PROSNITZ

STATE OF NEW YORK )
: SS.
COUNTY OF RICHMOND )

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 8 day of ~~June~~ March 1977 deponent served the within BRIEF upon

Cassin & Cassin, Esqs.
H.L. Richmand, Esq.
Hon. W. Bernard Richland, Corp. Counsel,
U.S. Atty., Eastern District of NY
U.S. Atty., So. Dist. of NY
attorney(s) for
Appellees

in this action, at
60 East 42nd St., NYC
16 Court St., Brooklyn, NY
Municipal Building, NYC
225 Cadman Plaza East, Brooklyn, NY and
1 St. Andrews Pla., NYC

the address(es) designated by said attorney(s) for that purpose by depositing 3 copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this 8 day of March, 1977

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978